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The elimination of negligence as a basis is not, therefore, fatal to the statute, provided the required chain of causation is supplied by other elements.

In fact, where there are strong considerations of public policy, even a causal relation may be unnecessary.¹⁴ Assuming, however, that some source of causation is essential, it is submitted that in the occupations affected by the New York Statute this requirement is to be found in the voluntary employment of the dangerous instruments and agencies from which the injury results. The statute may, perhaps, be obnoxious to state constitutional provisions guaranteeing a trial by jury, in that the liability imposed is measured by a fixed scale of compensation, but it seems safe to say that under the Fourteenth Amendment, at least, its constitutionality is reasonable clear.

MEASURE OF DAMAGES FOR CONVERSION OF STOCK BY A STOCK-BROKER.—The relation between stockbroker and customer in margin transactions is an anomalous one in law. The customer usually pays only a small part of the purchase price, the balance being advanced by the broker, who holds the stock as security for the loan. The latter stands in a fiduciary relation toward the purchaser and consequently is bound to exercise the greatest good faith.¹ Moreover, although the broker takes legal title to the stock in his own name, they also sustain a relation of pledgor and pledgee.² As a result, any unauthorized sale or other unlawful disposition of the stock by the broker is treated as a conversion, and subjects him to an action in tort.³

The measure of damages in such cases is governed by two fundamental principles. On the one hand, the owner must be fully indemnified for the injury sustained; on the other hand, the wrongdoer must not be permitted to derive any benefit or advantage from his act and consequently he must be compelled to refund all profits realized from such misappropriation.⁴ While in the case of chattels having a more or less fixed value, the plaintiff is sufficiently recompensed by being allowed the value of the article at the time of the conversion, yet where the property is of such a nature that its price is subject to constant fluctuations, this measure of damages would not afford him full compensation if the market rises after the conversion.⁵ As it is usually the purpose of the purchaser to speculate on the rise of the market rather than to buy the stock as a permanent investment, the real injury in that instance consists in the wrongful sale of the property at an unfavorable moment selected by the broker himself, and the consequent loss of profits that might have been gained by the

¹⁴See *Chicago v. Cement Co.* (1899) 178 Ill. 372; *People v. Hill* (Ill. 1896) 36 L. R. A. 634.

¹*Dos Passos, Stock-Brokers and Stock-Exchanges* 102; *Haight v. Haight & Freese Co.* (1906) 112 App. Div. 475, *aff'd* in 190 N. Y. 540; see *Brass v. Worth* (N. Y. 1863) 40 Barb. 648.

²*Dos Passos, Stock-Brokers and Stock-Exchanges* 111-115; *Baker v. Drake* (1876) 66 N. Y. 518; *Gruman v. Smith* (1880) 81 N. Y. 25; *Learock v. Paxson* (1904) 208 Pa. St. 602; 8 COLUMBIA LAW REVIEW 488.

³*Markham v. Jaudon* (1869) 41 N. Y. 235.

⁴*Suydam v. Jenkins* (N. Y. 1850) 3 Sand. Super. Ct. 614.

⁵*Galligher v. Jones* (1889) 129 U. S. 193; *Suydam v. Jenkins supra*; *contra Boylan v. Huguet* (1873) 8 Nev. 345.

customer.⁶ It is, therefore, the general consensus of opinion that if the stock rises after the wrongful act, the damages awarded must include in addition to the value at the time of conversion, compensation for the loss of probable profits. The English rule in similar transactions apparently allows as damages the value of the stock at the time of the trial.⁷ This doctrine originally rested on the theory that equity might compel the defendant to replace the stock in specie,⁸ but such an argument is no longer valid since at present specific performance of a contract for the sale of stock will not ordinarily be decreed.⁹ The chief objection to the English rule is found in the fact that the damages thus obtained depend upon outside circumstances rather than the injury actually suffered by the plaintiff. The amount recoverable is, therefore, rendered largely speculative and is governed by extrinsic considerations; in fact the sum awarded at a second trial may vary from that allowed at the first. The early New York doctrine,¹⁰ which seems to be followed in Pennsylvania,¹¹ granted the plaintiff the highest market price reached by the stock at any time between the conversion and the trial; some of the cases implying, however, that the action must have been commenced within a reasonable time after the conversion and prosecuted with ordinary diligence. This rule rests on the supposition that the plaintiff would have continued to supply the necessary margins and carry the stock, and on the very unlikely presumption that he would have sold it at the precise moment when it stood highest.¹² It fails, moreover, to recognize the principle that an injured party must take reasonable steps to render his damages as small as possible.¹³ This obligation places upon the plaintiff a duty to go into the open market and repurchase the same number of shares within a reasonable time after the conversion, and his recovery should, therefore, be based upon the amount he would thus be called upon to expend.¹⁴ In order to conform to the correct theory, the New York courts have modified their original view and consequently have formulated the present rule that the amount of recovery should be determined by the highest market value reached by the stock within a reasonable time after the wrongful act of the broker.¹⁵

⁶*Dimock v. U. S. Nat. Bank* (1893) 55 N. J. L. 296; *Galligher v. Jones supra*.

⁷*Shepherd v. Johnson* (1802) 2 East 211; *Harrison v. Harrison* (1824) 1 C. & P. 412; *Owen v. Routh* (1854) 14 C. B. 327.

⁸*Shepherd v. Johnson supra*.

⁹*Story, Eq. Jur.* § 717; 9 COLUMBIA LAW REVIEW 635.

¹⁰*Romaine v. Van Allen* (1863) 26 N. Y. 309; *Kortright v. Buffalo Commercial Bank* (N. Y. 1838) 20 Wend. 91; s. c. (1839) 22 Wend. 348; *Markham v. Jaudon supra*.

¹¹*Bank of Montgomery v. Reese* (1856) 26 Pa. St. 143; *Musgrave v. Beckendorff* (1866) 53 Pa. St. 310; but see *Huntingdon etc. R. R. & Coal Co. v. English* (1878) 86 Pa. St. 247.

¹²*Baker v. Drake* (1873) 53 N. Y. 211.

¹³*Miller v. Mariner's Church* (Me. 1838) 7 Greenl. 51.

¹⁴*Baker v. Drake* (1876) 66 N. Y. 518; *Wright v. Bank of Metropolis* (1888) 110 N. Y. 237.

¹⁵*Baker v. Drake* (1873) 53 N. Y. 211; s. c. (1876) 66 N. Y. 518; *Wright v. Bank of Metropolis supra*; *Minor v. Beveridge* (1894) 141 N. Y. 399. This rule is followed in most jurisdictions. *Galligher v. Jones supra*; *Wiggin v. Federal Stock & Grain Co.* (1905) 77 Conn. 507; *Dimock v. U. S. Nat. Bank supra*.

If, on the other hand, the market value declines after the conversion it has been said that the plaintiff is really benefited by the misappropriation and should therefore recover only nominal damages.¹⁶ While it is true that in such a case the plaintiff is not actually injured, to allow only nominal damages would violate the principle that one standing in a fiduciary capacity must not be permitted to profit by a conversion of the *cestui's* property, and consequently the recovery should be based on the amount realized by the defendant from the conversion.¹⁷ Inasmuch, therefore, as the suit while technically in trover is really one for a breach of trust, damages should be assessed in accordance with the theory governing such actions.¹⁸ It follows, then, that the plaintiff should be allowed to recover not the total proceeds of the sale, but only the value of his interest, which is to be measured by the difference between the sum obtained by the broker and the amount of the debt.¹⁹

The question was recently passed upon in *McIntyre v. Whitney* (1910) 124 N. Y. Supp. 234. Since the market value of the stock declined after the defendant's wrongful act, both the prevailing and the dissenting opinions adopted the rule that in such an instance the recovery should be based on the value at the time of the misappropriation. Yet, in spite of the fact that the defendant had sold the stock for an amount greater than the current value, the majority of the court considered the market price as the basis of the award. The dissenting opinion, apparently recognizing that this result would permit the defendant to retain a part of the profits of the conversion, properly contended that the measure of damages should be the difference between the sum realized by the broker and the amount of the debt.²⁰

TESTAMENTARY INTENT AS DETERMINING THE VALIDITY OF CONDITIONS IN RESTRAINT OF MARRIAGE.—The complexity of the law with regard to conditions in restraint of marriage is due largely to historical causes. Under the civil law, as adopted by the ecclesiastical courts in the administration of legacies, all such restraints were deemed void as opposed to public policy. The courts of equity, however, realizing that possibly this doctrine was inapplicable in England, and that it was obviously incompatible with common law principles, were unwilling to adopt the civil law in its entirety. Hesitating on the other hand wholly to repudiate it, they attempted by introducing exceptions to bring it into alignment with the theory of English law.

As a result of the compromise thus brought about, the courts while adhering to the rule which condemned all conditions totally restraining

¹⁶*Colt v. Owens* (1882) 90 N. Y. 368. See also *Gruman v. Smith supra*, and dissenting opinions in *Markham v. Jaudon supra*.

¹⁷*Taussig v. Hart* (1874) 58 N. Y. 425.

¹⁸*Cf.* 10 COLUMBIA LAW REVIEW 250.

¹⁹See *Barber v. Ellingwood* (N. Y. 1910) 137 App. Div. 704.

²⁰The case was complicated by the fact that the customer had paid off a part of his indebtedness to the broker after the conversion but before its discovery. The majority of the court allowed this amount to be included as part of the recovery, while the dissenting judge argued that since these payments had been made after the right of action had accrued, they should not be considered in estimating the damages, but that they could be recovered in a separate action.